

injury in the performance of duty on November 23, 1998. The Office accepted the claim for a right shoulder torn rotator cuff. Appellant underwent shoulder surgery on April 6, 1999.

In a form letter (CA-1049) dated May 6, 1999, the Office advised appellant that he would be paid compensation until further notice. The letter also advised appellant to notify the Office immediately if he returned to work to avoid an overpayment of compensation. Appellant was further advised that, if he worked during any period covered by a compensation payment, he must return the payment to the Office. The record indicates that appellant returned to full-time work on June 1, 1999.¹ The Office sent appellant another CA-1049 form letter dated June 21, 1999 regarding his compensation, and he was again advised to notify the Office of any return to work in order to avoid an overpayment of compensation.

Appellant continued to receive compensation for temporary total disability. The record contains a letter dated September 6, 2000 from the employing establishment, indicating that a compensation payment to appellant was being returned. It reported that appellant had been working since June 1, 1999 and had tried unsuccessfully to return several payments.

In a memorandum dated April 8, 2004, the Office indicated that the employing establishment had confirmed that appellant had returned to work on June 1, 1999.² By letter dated July 6, 2004, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred from June 1, 1999 to March 20, 2004. The Office noted that appellant had returned to work on June 1, 1999 but continued to receive compensation through March 20, 2004. According to the Office, appellant did return two compensation payments, one for the period August 15 to September 11, 1999, and from July 16 to August 12, 2000. The Office calculated the overpayment as totaling \$157,645.20.³

Appellant requested a hearing before an Office hearing representative, which was held on June 29, 2005. He indicated that he did try and send a couple of the payments back to the Office, but he kept receiving additional payments. According to appellant, the employing establishment advised him to put them in an account and see what happens.

By decision dated September 15, 2005, the Office hearing representative finalized the determination that an overpayment of \$157,645.20 was created and that appellant was at fault in creating the overpayment.

¹ An August 26, 1999 report pursuant to a nurse intervention program indicated that appellant was working full time with work restrictions.

² Although the memorandum stated that appellant returned to full duty, the record indicated that appellant initially returned to work in a light-duty capacity.

³ The Board notes that the calculation for the initial two years of compensation through June 16, 2001 did not include 2 compensation payments; the calculation is based on 24 compensation payments covering 28-day periods, rather than 26.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death.”⁴

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to full-time work at the employing establishment on June 1, 1999. He continued to receive compensation for temporary total disability through March 20, 2004. As noted above, he is not entitled to receive compensation for total disability after he has returned to work. Accordingly, an overpayment of compensation has been created.

Since the evidence indicated that appellant returned to full-time work at wages equal to or exceeding his date-of-injury wages on June 1, 1999, he would not be entitled to any compensation for wage loss after that date. The Office reported that appellant did return two compensation payments during the overpayment period, and these payments should not be included in the overpayment amount. The calculations provided indicate that the amount of compensation received from June 1, 1999 to March 20, 2004, excluding the returned payments, was \$157,645.20. The Board finds that this represents the amount of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”⁵

⁴ 5 U.S.C. § 8116.

⁵ 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

Section 10.433(a) of the Office's regulations provides that the Office:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”⁶

To determine if an individual was at fault with respect to the creation of an overpayment, the Office examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁷

ANALYSIS -- ISSUE 2

Appellant stated that both the Office and the employing establishment were aware of his return to work and therefore he should not be held responsible for the overpayment. The finding of fault, however, is based on his acceptance of payments that he “knew or should have known to be incorrect” pursuant to 20 C.F.R. § 10.433(a). In this regard, the Board notes that appellant was clearly advised on May 6, 1999 that to avoid an overpayment of compensation he must notify the Office of any return to work. Appellant was further advised that if he worked during any period covered by the payment, he must return the payment to the Office. Under these circumstances appellant should have known that he could not continue to receive the compensation payments after he returned to work on June 1, 1999. The Board notes that appellant did attempt to return two payments to the Office, which supports a finding that he was aware that the payments were incorrect. Although the Office apparently failed to respond to the information provided by appellant, that does not relieve him of the continuing obligation to return payments that he knew or should have known were incorrect.⁸

Based on the evidence of record, the Board finds that appellant accepted payments he knew or should have known were incorrect. Under 10.433(a) of the Office's regulations, he is properly found not to be “without fault” pursuant to 5 U.S.C. § 8129 and is not entitled to waiver of the overpayment. With respect to recovery of the overpayment, the Board's jurisdiction is

⁶ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁷ 20 C.F.R. § 10.433(b); *Duane C. Rawlings*, 55 ECAB ____ (Docket No. 02-2172, issued March 8, 2004).

⁸ The fact that the Office was negligent in making payment to appellant does not relieve him of fault in accepting the incorrect payments. *See William E. McCarty*, 54 ECAB 525 (2003).

limited to recovery from continuing compensation payments. Since the Office is not attempting to recover the overpayment from continuing compensation, the issue is not before the Board.⁹

CONCLUSION

The Board finds that a \$157,645.20 overpayment of compensation was created during the period June 1, 1999 to March 20, 2004. The Board further finds that appellant is not entitled to waiver of the overpayment because he accepted payments he knew or should have known were incorrect.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 15, 2005 is affirmed.

Issued: February 21, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *Levon H. Knight*, 40 ECAB 658, 665 (1989).